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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL MOLINAR JR., Defendant and Appellant.	G039616 (Super. Ct. No. 07CF0286) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kazuharu Makino, Judge. Affirmed in part, reversed in part, and remanded for further proceedings.

Anita P. Jog, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, and Kelley Johnson, Deputy Attorney General, for Plaintiff and Respondent.

* * *

Daniel Molinar, Jr. (appellant) appeals from a judgment of conviction entered after a guilty plea. We appointed counsel to represent him on appeal. Counsel filed a brief that set forth the facts and procedural history of the case. Counsel presented no argument for reversal but asked this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U.S. 738, counsel presented five possible but not arguable issues on appeal and identified certain clerical errors in the court's July 30 and October 1, 2007 minute orders and the abstract of judgment. We granted appellant 30 days to file a supplemental brief. In his responsive brief, appellant asserts that his trial attorney failed to conduct an adequate investigation of the case and conspired with the district attorney to coerce his plea. In addition, this court requested additional briefing from the parties on issues more fully discussed below.

Counsel asserts the trial court has corrected its minute orders, but counsel has been unable to confirm the court's preparation of an amended abstract of judgment. Therefore, we direct the clerk of the superior court to correct the abstract of judgment as set forth below and to forward the corrected abstract of judgment to the Department of Corrections. As corrected, the judgment is affirmed.

I

FACTS

On January 23, 2007, the People charged appellant with one count of possession of heroin for sale. (Health & Saf. Code, § 11351.) The felony complaint also alleged one prior serious felony conviction, pursuant to the "Three Strikes" law, and three prior prison terms, pursuant to Penal Code[1] section 667.5, subdivision (b). Appellant pled not guilty to all charges and denied all enhancements.

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[1] All further undesignated statutory references are to the Penal Code.

On January 29, the People filed an amended complaint, which added a section 12022.1, subdivision (b) on-bail enhancement and two additional prior prison term allegations. Appellant pled not guilty to all charges and denied all enhancements. The matter was continued to February 26 for a pretrial hearing, and then to March 19 for a preliminary hearing.

At the preliminary hearing, Detective Christopher Harvey of the Brea Police Department testified that appellant was arrested on January 19, 2007 during the execution of a search warrant for a particular residence in the City of Orange. While conducting a search of the residence's attached garage, Harvey saw appellant throw something into a garbage can. When Harvey investigated, he discovered a number of pieces of aluminum foil streaked with tar heroin. He later discovered three bindles containing a total of 1.88 grams of tar heroin tucked into three plastic bindles and heroin paraphernalia. In Harvey's opinion, the amount of heroin found was consistent with possession for sale, but there were no other indicia of sales on appellant's person or in the garage. Although the magistrate acknowledged the weaknesses in the People's case, he nonetheless found sufficient evidence to hold appellant to answer for the charge alleged.

On March 28, the People filed an information charging Molinar with possession of heroin for sale. The information re-alleged the "strike" prior and five prior prison enhancement allegations, but did not contain the on-bail enhancement that had previously been amended into the felony complaint. On April 3, appellant pled not guilty to the charge and denied all enhancement allegations. The matter was continued several times during the following months, but was eventually scheduled for trial on July 30.

On July 30, the People and appellant entered into a plea agreement. The conditions of the plea were that appellant pled guilty to simple possession of heroin (Health & Saf. Code, § 11350) and receive a total term of four years on the condition the People dismiss the charge of possession of heroin for sale. In order to facilitate the agreement, the court amended the information to add a count 2 and dismissed count 1 on

motion of the People. The court also struck all prior prison term enhancement allegations for sentencing purposes, and the court imposed a total term of four years, which is the two-year midterm sentence for possession of heroin, doubled pursuant to the Three Strikes law.

The factual basis for the plea, as stated in the *Tahl*[2] form, is as follows: "In Orange County, California, on 1-19-07, I did unlawfully possess a usable quantity of a controlled substance, heroin." The form also references a separate case, a trailing probation violation case (*People v. Molinar* (Super. Ct. Orange County, case No. 06CF0705) (hereinafter case No. 06CF0705)), and states, "R&T. Impose 6 year suspended sentence, to run concurrent w/07CF0286. CTS = 427 + 212 = 639."

Before taking appellant's plea, the trial court orally advised him of his constitutional rights and verified appellant's signature on the *Tahl* form. The court asked if appellant's plea was voluntary and made sure appellant was aware of the consequences of his plea. With one exception, the record reflects appellant verbally stated that he understood his constitutional rights and voluntarily entered into the plea agreement. The one exception is as follows: When the court asked, "Has anyone made any threats, used any force against yourself, family, or loved ones, or made any promises to you other than set forth in the guilty plea form in order to convince [you to] plead guilty, Mr. Molinar[,]" appellant replied, "Yes." The court did not inquire further, but next asked, "And Mr. Molinar to a violation of Health and Safety Code section 11350(A), how do you plead?" Appellant replied, "Guilty."

After appellant entered his plea and admitted all enhancement allegations, the court stated, "Court will accept the guilty plea. Find there's a factual basis for each guilty plea. Further find the defendant's been fully advised of the consequences of his plea and his constitutional rights. That each plea of guilty has been freely and voluntarily

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[2] See *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122.

entered. And there's a knowing, intelligent waiver of those rights." There was a brief discussion about case No. 06CF0705, the separate probation violation proceeding, but the court directed the district attorney and defense counsel to return to the original sentencing judge for resolution of a sentencing problem in that case before ordering all parties to return for a continued sentencing hearing at a future date.

After a couple of continuances, the sentencing hearing occurred on October 1. The court imposed the bargained-for sentence of two years for possession of heroin, doubled pursuant to the Three Strikes law, for a total term of four years. The court struck all five prior prison term enhancements for sentencing purposes, awarded appellant 379 days custody credits (253 actual days, plus 126 days conduct credits), imposed a $200 restitution fine (§ 1202.4, subd. (b)) and a $200 parole revocation fine (§ 1202.45), which is suspended unless parole is revoked, and ordered appellant to pay a $20 court security fee (§ 1465.8, subd. (a)(1)).[3] The court did not mention case No. 06CF0705 at the sentencing hearing, and there was no objection by either party to the court's imposition of sentence.

On October 25, appellant filed a pro per motion to withdraw his guilty plea on the grounds of ineffective assistance of counsel. The supporting declaration attached to his motion lacks specificity and includes form verbiage and legal citations. However,

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[3] The court's minute orders from July 30 and October 1, 2007, and the abstract of judgment, incorrectly state appellant pled guilty to count 1 of the information, possession of heroin for sale, a violation of Health and Safety Code section 11351. The *Tahl* form and the reporter's transcript reflect the court amended the information to add count 2, simple possession of heroin, a violation of Health and Safety Code section 11350, and that the court accepted Molinar's guilty plea to the added count 2 and dismissed count 1. "Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls. [Citations.]" (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) Appellant's counsel verified that the court has corrected the July 30 and October 1, 2007 minute orders, but could not verify the correction of the abstract of judgment. Consequently, we direct the court to correct its abstract of judgment and forward a corrected copy to the Department of Corrections.

on the same day, appellant also filed a handwritten letter in which he asserted that he had been "misinformed by [his] counsel" and "duped" into pleading guilty, and that his attorney failed to contact defense witnesses as promised.

On October 30, the court denied appellant's motion to withdraw the plea. The court's minute order states, "A motion to withdraw a guilty plea is governed by Penal Code section 1018. Judgment here has already occurred, the statutory criteria are therefore not met, and the trial court lacks jurisdiction to grant Defendant's motion under section 1018. [Citation.] The motion is denied on that basis. [Citation.] Defendant does not show that he meets the requirements of a petition for a writ of error coram nobis . . . . Treated as a petition a for writ of habeas corpus, Defendant fails to plead adequate grounds for relief. . . ." Appellant sent a letter to the court that further addressed his motion to withdraw plea, which was filed on November 14, and a fourth letter that questioned the Department of Corrections credit calculations was filed on November 16.

On November 28, appellant filed a notice of appeal and request for a certificate of probable cause. In his supporting declaration, Molinar asserted the following: "I was misinformed by the Alternate Attorney that my strike would be stricken and that their office never attempted to contact my witness. [¶] Also I was told all my time would be credited but it is not. [¶] I don't recall ever pleading on record to the charge in case # 07CF0286." On December 13, the court again denied appellant's motion to withdraw guilty plea and petition for writ of habeas corpus. Appellant's request for a hearing and the appointment of counsel were also denied. On December 18, the court denied appellant's request for a certificate of probable cause.

II

DISCUSSION

Section 1237.5 provides, "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are

met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court." (See also Cal. Rules of Court, rule 8.304.) Generally, a defendant cannot challenge the validity of a plea of guilty or no contest absent a certificate of probable cause. (§ 1237.5; *People v. Mendez* (1999) 19 Cal.4th 1084, 1095.)

There are two exceptions to section 1237.5: (1) an appeal from the denial of a motion to suppress, pursuant to section 1538.5; and (2) an appeal based solely on grounds occurring after entry of the plea which do not challenge its validity. (*People v. Panizzon* (1996) 13 Cal.4th 68, 75.) However, "a challenge to a negotiated sentence imposed as part of a plea bargain is properly viewed as a challenge to the validity of the plea itself. Therefore, it [is] incumbent upon [such a] defendant to seek and obtain a probable cause certificate in order to attack the sentence on appeal." (*Id.* at p. 79.) As was stated in *People v. Cole* (2001) 88 Cal.App.4th 850, "A strict application of section 1237.5 works no undue hardship on defendants with potentially meritorious appeals. The showing required to obtain a certificate is not stringent. Rather, the test applied by the trial court is simply 'whether the appeal is clearly frivolous and vexatious or whether it involves an honest difference of opinion.' [Citation.] Moreover, a defendant who files a sworn statement of appealable grounds as required by section 1237.5, but fails to persuade the trial court to issue a probable cause certificate, has the remedy of filing a timely petition for a writ of mandate. [Citations.] Thus, if he complies with section 1237.5, a defendant has ample opportunity to perfect his appeal. Since a guilty or no contest plea to a felony charge 'admits all matters essential to the conviction' [citations], it is not unreasonable to insist on such compliance in order to identify frivolous or vexatious appeals. [Citations.]" (*Id.* at p. 860, fn. 3.)

Our initial review of the record indicated that there may have been arguable appellate issues. As a result, we requested the parties submit supplemental letter briefs addressing certain issues, primarily the application of sections 1237.5 and 1018 to appellant's case. On further consideration, we conclude that section 1237.5 bars review of a majority of appellant's claims, and we find no other error in judgment.

Section 1018 provides, in pertinent part, "On application of the defendant at any time before judgment or within six months after an order granting probation is made if entry of judgment is suspended, the court may, and in case of a defendant who appeared without counsel at the time of the plea the court shall, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted." "To establish good cause, it must be shown that defendant was operating under mistake, ignorance, or any other factor overcoming the exercise of his free judgment. [Citations.] Other factors overcoming defendant's free judgment include inadvertence, fraud or duress. [Citations.]" (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.) "The burden is on the defendant to present clear and convincing evidence the ends of justice would be subserved by permitting a change of plea to not guilty." (*People v. Shaw* (1998) 64 Cal.App.4th 492, 496.) We review the trial court's decision under the abuse of discretion standard. (*People v. Weaver* (2008) 118 Cal.App.4th 131, 146.)

Absent a clear showing of abuse, the plea agreement stands: "'Guilty pleas resulting from a bargain should not be set aside lightly and finality of proceedings should be encouraged.' [Citation.]" (*People v. Weaver, supra,* 118 Cal.App.4th at p. 146.) In a criminal case, judgment is rendered when the trial court orally pronounces sentence. (*People v. Ibanez* (1999) 76 Cal.App.4th 537, 543.) In this case, appellant filed his motion to withdraw guilty plea *after* entry of the judgment. Therefore, the trial court correctly denied the motion to the extent appellant attempted to rely on section 1018. Thus, appellant could properly obtain leave to withdraw a plea of guilty only by petition for the common law remedy of a writ of error *coram nobis.* (*People v. Wade* (1959) 53

Cal.2d 322, 339, disapproved on other grounds in *People v. Carpenter* (1997) 15 Cal.4th 312, 381.)

Here, the trial court also considered appellant's untimely motion to withdraw guilty plea as a common law petition for writ error *coram nobis*. (See, e.g., *People v. Grgurevich* (1957) 153 Cal.App.2d 806, 810; *People v. Wade, supra,* 53 Cal.2d at p. 329, disapproved on other grounds in *People v. Carpenter, supra,* 15 Cal.4th at p. 381.) However, "[*c*]*oram nobis* will not issue to vacate a plea of guilty solely on the ground that it was induced by misstatements of counsel [citation] or where the claim is that the defendant did not receive effective assistance from counsel. [Citations.]" (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 982-983.) "The writ will properly issue only when the petitioner can establish three elements: (1) that some fact existed which, without his fault or negligence, was not presented to the court at the trial and which would have prevented the rendition of the judgment; (2) that the new evidence does not go to the merits of the issues of fact determined at trial; and (3) that he did not know nor could he have, with due diligence, discovered the facts upon which he relies any sooner than the point at which he petitions for the writ. [Citations.]" (*People v. Soriano* (1987) 194 Cal.App.3d 1470, 1474; see also *People v. Shipman* (1965) 62 Cal.2d 226, 230.) "In view of these strict requirements, it will often be readily apparent from the petition and the court's own records that a petition for *coram nobis* is without merit and should therefore be summarily denied." (*People v. Shipman, supra,* 62 Cal.2d at p. 230.)

After reviewing the entire record, we find no abuse of the trial court's discretion in its denial of appellant's motion to withdraw his plea even when construed as a petition for writ of error *coram nobis*. Appellant did not assert new evidence going to the merits of the factual issues that had been determined. Rather, he contended that his trial counsel conducted an inadequate investigation and conspired with the district attorney to coerce his guilty plea, assertions unsupported by evidence in the appellate

record. To the extent appellant sought to assert a claim of ineffective assistance of counsel, the record does not support this claim either.

Generally speaking, "'"[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim . . . is more appropriately decided in a habeas corpus proceeding. [Citations.]'" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) Here, we have nothing but appellant's unverified claims of inadequacy and corruption, which are insufficient by themselves to reverse a prima facie validly entered judgment. Based on the record, which is the limitation of appellate review, there is no way to determine the adequacy of defense counsel's investigation, and no reason to assume anything but that counsel recommended appellant enter a guilty plea after conducting an adequate investigation. Counsel was not asked to explain his actions. Nor do we have evidence defense counsel made material misrepresentations or otherwise acted inappropriately in the entry of the guilty plea. Further, while appellant believes he was somehow coerced into pleading guilty, the appellate record does not support his belief. "Because claims of ineffective assistance are often more appropriately litigated in a habeas corpus proceeding, the rules generally prohibiting raising an issue on habeas corpus that was, or could have been, raised on appeal [citations] would not bar an ineffective assistance claim on habeas corpus. (*People v. Mendoza Tello*, *supra*, 15 Cal.4th at p. 267.)

Based on the evidence contained in the appellate record, it appears appellate suffers from nothing more than a case of buyer's remorse. The plea agreement called for a dismissal of the more serious charge of possession of heroin for sale, the court's striking of five prior prison term enhancement findings, and a guaranteed sentence of four years in exchange for a plea of guilty to simple possession of heroin. The *Tahl* form's references to case No. 06CF705 became dependent upon the actions of

another judge during the sentencing hearing. The parties agreed to this changed condition in court and on the record, and there is no reason to assume the other judge acted beyond the scope of appellant's plea agreement. In short, nothing in the record suggests the original sentencing court in case No. 06CF705 failed to resolve whatever outstanding issues remained. Further, there is no evidence appellant filed an appeal from the judgment in case No. 06CF0705 and the statutory time period for doing so has long since passed.

Appellant's final complaint is that he did not receive custody credits in an amount guaranteed by the plea bargain. However, the *Tahl* form guaranteed he would receive 255 days custody credits (191 actual plus 94 custody) as of July 30, 2007. At the sentencing hearing, which occurred 62 days later, the trial court awarded presentence credits of 379 days (253 actual plus 126 custody). These numbers are accurate.[4] A different part of the *Tahl* form references other custody calculations, but those numbers relate to case No. 06CF0705 and not the instant case. Consequently, we find no error in the court's calculation of appellant's presentence custody credits.

III

DISPOSITION

The clerk of the superior court is directed to correct the abstract of judgment to reflect the dismissal of count one, possession of heroin for sale, a violation of Health and Safety Code section 11351, the court's amendment to add a second count, possession of heroin, a violation of Health and Safety Code section 11350, appellant's

[4] Under sections 4019 and 2900.5, and the credit calculation formula set forth in *People v. Smith* (1989) 211 Cal.App.3d 523, 527 and *People v. Fabela* (1993) 12 Cal.App.4th 1661.)

guilty plea to count 2 of the first amended information (possession of heroin a violation of Health and Safety Code section 11350). As corrected, the judgment is affirmed.

SILLS, P. J.

WE CONCUR:

BEDSWORTH, J.

IKOLA, J.